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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC Intervenors,	DIVISION'S OBJECTIONS TO PETITIONERS'MOTION TO OFFER AIR QUALITY AND CULTURAL RESOURCE DEPOSITIONS INTO EVIDENCE Docket No. 2009-019 Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through its counsel hereby Objects to the Petitioners' motion to offer the depositions of Division witnesses as evidence in the hearing of the air quality and cultural resource issues.

The Motion to offer these depositions as evidence in the hearing is untimely. The Petitioners have rested their case[1]. The Petitioners did not offer to publish these exhibits during

[1] Buccino in the 4/29 hearing at 141:22 "We presented our case through what has already happened. And we have nothing further to present at this hearing on air quality."
and

the presentation of the case and did not refer to the deposition testimony during the direct testimony for any purpose. Had the Petitioners made this motion in a timely manner, Division counsel and the Board could have asked the witnesses to clarify the testimony if necessary.

The motion to introduce deposition testimony was made by Mr. Morris after the Board's ruling on his motion *in limine* and was understood by the Division's counsel to apply only to the depositions of the hydrology witnesses. The agreement to allow for resumption of the motion during the break between hearings was also understood to only apply to the hydrology witnesses, since Ms. Bucinno did not speak to the issue. This agreement for an extension was subject to the Division's continuing objection and argument that there was a need to show a purpose justifying their admission. Ms. Buccino never verbally joined in the discussions and never offered depositions during the hearing or at closing discussions. It is now untimely to add new evidence in any form and particularly in the form of the deposition testimony of witnesses who the Petitioners either elected to not call at the hearing, or if called they elected not to question about their deposition testimony.

The Board is authorized and empowered to determine the use of discovery including the admissibility of these depositions. The Utah Rules of Civil Procedure and certainly the federal cases applying the federal rules are not governing. The Division clearly did not intend to allow the use of this testimony as now argued when counsel agreed to allow discovery. However, if the Board believes that it is now bound by Rule 32(a)(2) of the Utah Rules of Civil Procedure to allow the use Rule 30(b) (6) deposition testimony, the Board should not afford this testimony the

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Buccino in the 4/30 hearing at 124:13 "The petitioners are done with the presentation of evidence on the cultural resource issue."

same weight as the testimony given at the hearing. Such deference is not required by Rule 30(b)(6) nor Rule 32(a)(2) of the Utah Rules of Civil Procedure and would not be appropriate.

The Board is charged with making findings of fact including evaluating the creditibility of the evidence. If he Board feels compelled to allow the deposition testimony to be admitted, it should consider that the Petitioners chose not to call the witnesses whose testimony is now offered, and chose not to question the witnesses called about their deposition testimony. Petitioners chose not to allow the Board to compare the testimony and judge it for itself. The Board should not give this deposition testimony equivalent weight to the testimony that was presented at the hearing. The testimony at the hearing fully complied with the requirements of the Utah Administrative Procedures Act, and the Board's rules: it was subject to cross-examination, and questions by the Board, it was presented at the time and place designated for trying the issues, and the Board was able to judge for itself the questions and context of the examination.

The argument that the testimony being provided by Division's witnesses at the depositions was admissible for any purpose and more binding than 'normal' discovery was not raised by Petitioners until after the depositions. The parties had agreed to discovery including the taking depositions on a shortened time schedule in order to allow for each party to preview the expert opinions and basis for the witnesses' future testimony at the hearing. The witnesses were asked questions by opposing counsel without interruption and without rulings on objections. The Petitioners' counsel chose the subjects to be examined and the nature of the questions and his persistence was not moderated by Board oversight. The Division had no obligation to present its case via the deposition. If areas were left unquestioned that was not for the Division to pursue in that forum.

This is in contrast to the hearing before the board where both parties were on notice that a record was being presented to the trier of fact and law. At this hearing the Petitioners elected not to put on witnesses or ask questions about issues they now ask the Board to determine based on the depositions. The Board should give such unobserved, un-probed testimony little weight in the event it is decided that it should be allowed to become part of the record.

Respectfully submitted this 11th day of ~~April~~ May, 2010

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Objection to Petitioners' Motion for Admission of Deposition Testimony to be delivered electronically to following person this 11th day of MAY, 2010

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